

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
CENTRAL TEXAS COMMUNICATIONS, INC.)
)
Request for Waiver of Section 101.305(b) of the)
Commission's Rules or, in the Alternative, for)
Declaratory Ruling)

ORDER

Adopted: October 1, 2003

Released: October 3, 2003

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

1. *Introduction.* On February 14, 2003, Central Texas Communications, Inc. ("Central Texas") filed a request for waiver of Section 101.305(b) of the Commission's Rules to allow Central Texas to temporarily discontinue its U.S. domestic interstate telecommunications service being offered through its Local Multipoint Distribution Service (LMDS) stations authorized under call signs WPOH502, WPOH503, and WPOH932, in San Angelo, Brownwood, and Goldthwaite, Texas.¹ In the alternative, Central Texas requests a declaratory ruling that Section 101.305(b) does not apply to LMDS licensees in light of the Commission's LMDS regulatory regime and policy goals of providing maximum operational flexibility to holders of authorizations acquired via competitive bidding.² On March 26, 2003, the Public Safety and Private Wireless Division sought comment on Central Texas's request.³ For the reasons discussed herein, we grant the request for declaratory ruling to the extent indicated.

2. *Background.* In 1998, Central Texas participated in the Commission's initial auction of LMDS licenses. Central Texas was the winning bidder for, *inter alia*, two channel blocks in the San Angelo Basic Trading Area (BTA) and one channel block in the Brownwood BTA.⁴ The licenses were granted on September 24, 1998. The construction requirement for LMDS licensees is a showing of "substantial service" in their license area within ten years of being licensed.⁵ Consequently, the

¹ Central Texas Request for Waiver, or, in the Alternative, Declaratory Ruling at 5 (filed Feb. 14, 2003) (Request).

² *Id.* at 13-14.

³ Wireless Telecommunications Bureau Seeks Comment on Request by Central Texas Communications, Inc. for Waiver to Allow Temporary discontinuance of Local Multipoint Distribution Service, *Public Notice*, 18 FCC Rcd 5512 (WTB PSPWD 2003).

⁴ See LMDS Auction Closes, *Public Notice*, 13 FCC Rcd 18217 (WTB 1998).

⁵ 47 C.F.R. § 101.1011(a). The Commission offered the following safe harbor examples of what would constitute substantial service: For an LMDS licensee that chooses to offer point-to-multipoint services, a demonstration of coverage to twenty percent of the population of its licensed service area at the ten-year mark would constitute substantial service. In the alternative, an LMDS licensee that chooses to offer fixed, point-to-point services, the construction of four permanent links per one million people in its licensed service area at the ten-year renewal mark would constitute substantial service. See Rulemaking to Amend Parts 1, 2, 21, 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and (continued....)

construction deadline for Central Texas's LMDS licenses is September 23, 2008. Central Texas has not yet filed the required notification that it has met its substantial service obligation.⁶

3. Central Texas states that, shortly after the licenses were granted, it purchased and installed equipment manufactured by Newbridge, Inc., and began providing data services, and later, voice services, to subscribers.⁷ Soon, thereafter, however, Newbridge discontinued manufacture and technical support of the equipment.⁸ Central Texas states that it has replaced the Newbridge equipment with that from another manufacturer, but the new equipment has proved unreliable, resulting in poor service, and expensive to maintain.⁹ Central Texas represents that, given the small number of current customers it serves and the expense of maintaining the equipment, it is losing approximately \$20,000 each month.¹⁰ It states that there is no technically reliable, economically viable LMDS equipment currently available in the United States.¹¹ It therefore wishes to discontinue its current service until more affordable and reliable communications equipment can be developed and manufactured.¹²

4. Section 101.305(b) of the Commission's Rules provides that common carrier licensees must obtain prior Commission authorization in order to voluntarily discontinue, reduce, or impair public communication service to a community, and that, "[i]n the event that permanent discontinuance of service is authorized by the Commission, the station license is terminated."¹³ Central Texas seeks a waiver of this provision or declaratory ruling to permit it to permanently discontinue its present service to San Angelo and Brownwood without its licenses terminating.

5. *Discussion.* Central Texas argues¹⁴ that a waiver is warranted under both standards set forth in Section 1.925 of the Commission's Rules.¹⁵ Specifically, it argues that application of the rule would not serve the underlying purpose of Section 101.305(b), which was designed to prevent spectrum warehousing, and would be contrary to the public interest by depriving residents of these communities of an alternative to local telephone and high-speed Internet services, which Central Texas intends to resume providing as soon as appropriate equipment is available.¹⁶ It also argues that the lack of appropriate equipment is a unique circumstance that makes application of the rule inequitable, unduly burdensome, and contrary to the public interest.¹⁷ In the alternative, Central Texas requests a declaratory ruling that

(...continued from previous page)

for Fixed Satellite Services, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, CC Docket No. 92-297, 12 FCC Rcd 12545, 12660 ¶ 270 (1997).

⁶ See 47 C.F.R. § 1.946(d).

⁷ Request at 3.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 3-4.

¹¹ *Id.* at 4.

¹² *Id.*

¹³ 47 C.F.R. § 101.305(b).

¹⁴ Request at 5.

¹⁵ 47 C.F.R. § 1.925(b)(3). The Commission will grant a waiver if (a) it is in the public interest and the underlying purpose of the rule would be frustrated or not served by application to the present case, or (b) in view of unique or unusual factual circumstances, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.

¹⁶ Request at 6-10.

¹⁷ *Id.* at 10-12.

Section 101.305(b) does not apply to LMDS licensees in light of the Commission's LMDS regulatory regime and policy goals of providing geographic licensees maximum operational flexibility, such as requiring a showing of "substantial service" rather than a specific construction requirement.¹⁸

6. We conclude that the permanent discontinuance provision in Section 101.305(b) of the Commission's Rules and other permanent discontinuance provisions¹⁹ are not applicable to a licensee whose construction period has not expired and who has not filed the required construction notification. Section 101.61 of the Commission's Rules specifically provides that LMDS licensees "may add, remove, or relocate facilities within the area authorized by the license without prior authorization."²⁰ The purpose of Section 101.61 is to provide operational flexibility for licensees, so that a licensee can increase or change its operations within the geographic area to respond to commercial demand without the need for additional licenses.²¹ To interpret Section 101.305(b) as resulting in license cancellation whenever operations are permanently discontinued would nullify the flexibility provided by Section 101.61. We agree with Central Texas²² that it also would be at odds with the intent of the permanent discontinuance rules, which is to encourage licensees to use, rather than warehouse, their spectrum.²³ We also agree with the comments of the National Telecommunications Cooperative Association that applying the permanent discontinuance provision of Section 101.305(b) to LMDS licensees that provide service prior to their construction deadline, but not to licensees that do not construct until they are required to, would have the perverse effect of punishing operators for using their licenses,²⁴ and that such a result would be illogical.²⁵ Consequently, we conclude that the most reasonable interpretation of Section 101.305(b) is that the permanent discontinuance provision does not apply to LMDS geographic area licenses prior to the construction deadline.

7. We therefore grant Central Texas's request to the extent that we conclude that the permanent discontinuance provision of Section 101.305(b) does not apply to the licenses for Call Signs WPOH502, WPOH503, and WPOH932. We need not address Central Texas's request for waiver, or its request for a broader declaratory ruling that the permanent discontinuance provision of Section 101.305(b) does not apply to any LMDS license.²⁶ We remind Central Texas, moreover, that this

¹⁸ *Id.* at 13-14.

¹⁹ *See, e.g.*, 47 C.F.R. §§ 1.955, 101.65.

²⁰ 47 C.F.R. § 101.61.

²¹ *See* Implementation Of Sections 309(J) And 337 Of The Communications Act of 1934 as Amended, *Notice of Proposed Rule Making*, WT Docket No. 99-87, 14 FCC Rcd 5206, 5238 n.190 (1999); *see also* Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, CC Docket No. 92-297, 12 FCC Rcd 12545, 12647 ¶ 235 (1997).

²² *See* Request at 6-7.

²³ *See, e.g.*, Reorganization and Revision of Parts 1, 2, 21, and 94 of the Commission's Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Services, *Report and Order*, WT Docket No. 94-148, 11 FCC Rcd 13449, 13465 ¶ 36 (1996); Glendale Electronics, Inc., *Order*, 17 FCC Rcd 22189, 22195 ¶ 13 (WTB CWD PRB 2002) (citing Amendment of Part 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, *Notice of Proposed Rulemaking*, PR Docket No. 90-481, 5 FCC Rcd 6401, 6401 ¶¶ 2-3 (1990)).

²⁴ National Telecommunications Cooperative Association Comments at 2; *see also* Request at 9.

²⁵ *See, e.g.*, BDPCS, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 17590, 17608 ¶ 32 (2000) (rejecting illogical result when rule language permits more reasonable interpretation).

²⁶ Consequently, we do not address the application of Section 101.305(b) to a geographic area license where the licensee permanently discontinues operations after its construction deadline.

decision does not affect its other regulatory obligations associated with construction and operation of an LMDS facility.

8. Accordingly, IT IS ORDERED that pursuant to Section 4(i) of the Communication Act of 1934, 47 U.S.C. § 154(i), and Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, the request for waiver or, in the alternative, declaratory filed by Central Texas Communications, Inc. on February 14, 2003, IS GRANTED to the extent indicated above.

9. This action is taken under delegated authority pursuant to Section 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§0.131 and 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
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